Supreme Court, U.S.
FILED

95 1061 DEC 27 1995

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

October Term, 1995

ROGER TILBURY, et al.,

Petitioners,

v.

MULTNOMAH COUNTY; OREGON, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

Roger Tilbury
Attorney at Law
1123 SW Yamhill
Portland, Oregon 97205
(503) 224-8503
Counsel for Petitioners
Counsel of Record

December 26, 1995

20 pp

QUESTION PRESENTED

Does a State deprive a taxpayer of his personal due process right to "meaningful backward–looking relief" when the state refuses to make a refund of illegally collected taxes unless the taxpayer files a joint petition for refund with nine other taxpayers within 60 days of the date when the tax statement was mailed to him?

PARTIES TO THE PROCEEDING

Roger TILBURY;
Margaret M. Tilbury; James Marquard;
Elizabeth Marquard; Linda K. Richardson;
Alan E. Kinsel, Jr.; John Ferguson; Sarah Ferguson;
John Bulkley; Honor Bulkley; Jason Cho; Carlyle MacHarg III;
Dale Denson, dba Dalton Realty;
Jeffrey A. Reingold; Francine G. Reingold;
Greg Fowler/Martin Shore, dba Fowler/Shore Acquisitions;
J. G. Jones Co.; Fran Matson;
Ruth W. Norris; Fred W. Norris;
Eileen Dahlheim; Martin G. Zell;
Richard A. Leffler; Amy Richardson-Leffler;
Sylvia May Kissinger; Barbara Jean Kissinger;
Arnold Rochlin; Kaye Rochlin;
Janice Sakofsky; Renda K. Horn,
trustee for Clyde V. and E. Margaret
Brummell Trust; Mae G. Strong;
Mark S. Pelay, PR Estate of Anthony
Pelay, Jr.; Hendrika S. Fincher;
Jack D. Dixon; Carol J. Dixon;
Florence E. Fritzler; Harold W.
Fritzler; James J. Mclaughlin;
Robert D. Randall; the Robert
Randall Co.; Clifford C. Stephens;
Rhonda M. Stephens; Kenneth Allen
Pereira; B & B Metal, Inc.;
Robert D. Banford; Betty R. Banford;
Ronald L. Williams; Phyllis M. Williams;
Vern R. Williams; Robert Lincoln;
Janet L. Benson; Thomas M. Ullmann;
Kathryn A. Blanchard; Donald E. Pollock,
dba Don Pollock Investments;
Julia G. Pollock; Jeffrey P. Fish;
Lynn E. Fish; Robert A. Scanlon;
Richard I. Kessler; Holly S. Kessler;
Roger E. Kurilo; Jerry L. Ward;
Nancy A. Ward; Ronald R. Myers;

Darlene K. Myers; Joan R. Salvatore;
Dennis G. Ogan; Kathryn H. Ogan;
Richard D. Lutz; Dorothy M. Lutz;
Albert H. Gruen; Maxine P. Gruen;
Charles G. Coulter; Edna M. Coulter;
Thomas P. Moyer; dba Tom Moyer Theatres
and TMT Development Co., Inc.;
Harding G. Carlson; Anita L. Carlson;
Cliff Stephens; Richard L. Carpenter;
Don Baker; Levern J. Stevens;
Ruth E. Mcnamee; Bobby D. Mcnamee;
Mary Mott; Brad P. Every;
Rachel M. Seal; Fred E. Hungate;
Doris W. Evatt; David D. Rand;
Arlene J. Rand; Velma Henderson;
Dean Becker; Joyce E. Becker;
Joseph E. Weston, dba Weston
Investment Co.; John W. Russell,
dba Russell Acquisition Co., Inc.;
Two Hundred Market Assoc.;
Elmer L. Reho; Edith M. Reho;
William L. Self; Margaret M. Self;
John W. Stenkamp; Carroll J. Stenkamp;
Richard A. Pedersen; Patricia R.
Pedersen; Hugh W. Milleson;
Susan Robertson; Ray K. O'Dell;
Shirley J. O'Dell; A. E. Brim;
William C. Reed, dba R & R Homes, Inc.;
Oregon Worsted Company; Eben Hill;
Mabel Hill; James C. Butler;
Addie K. Benson; Sivers Development
Group, dba Sivers Construction Co.,
a Washington corporation; Sivers
Investment Partnership, a limited
partnership; Propco, Inc.,
an Oregon corporation; T & W
Equipment Co., an Oregon corporation;
Airport Way Associates, a limited
partnership; Sivers Real Property

Partnership, a limited partnership;
Elizabeth Sivers; Guardian Management
Corporation, agent in fact and assignee;
James P. Kramer; Mamie C. Kramer;
Melvin Barcus, Chris W. Chilberg;
Linda S. Chilberg; Stuart Cox and
Richard Gerstl, dba Pyramid Properties;
Richard H. Fabrycki; Janice E. Fabrycki;
Hhugh Ewart; Rogers Construction, Inc.;
Oregon Asphaltic Paving Co.; C. K.
Hammond, TR; Jean R. Hammond, TR;
Terry L. Holden; Leo G. Graham;
Arthur A. Riedel; Kenneth J. Pipps to J & J Properties, Inc.;
Marquam Village Investors;
Steve Johnson; Jane D. Keating-Jones;
Dale G. King; Maxine J. King;
WPL Associates; Henry G. Laun;
Yvonne L. Laun, Leavitt Shay Real Estate
Services, managing agent for
Flanders Street Partners & Uptown
Heights Associates; James A. Montgomery;
Esther A. Montgomery; Alvin D. Nadeau;
Peter A. Nathan, M.D.; Helle Nathan;
Bertil Olson; Beverly Olson;
Charles H. Randolph; Leila F. Randolph;
Robert F. Rinker; Aubrey P. Schmidt;
general partner in Twenty-Second & Davis
Oregon, Ltd. and The Flanders Partnership;
Geraldine M. Zancolli; Upshur Courts, Inc.;
Steve Rose; Bristol Equities, Inc.;
Richard O. Hartmann; Kris Preslan;
Bruce Preslan; Spar Investment Co.;
Galt Associates; La Hacienda Associates;
Brim, Inc.; Brim Capital Corporation;
Evona Brim; Christopher B. Summerer;
Nancy Summerer; Edward L. Clare;
Hazel A. Clare; Patricia S. Cavens;
Norman Stoll; Mike Schaeffer;
Milton Wiederhold; Stephen C. Johnson;

Josefina M. Johnson; Oswald E. Jauch; Inge H. Jauch;
Brent H. Jauch;
Roger P. Jauch; Westland Investment Co.;
Benhardt Schmidt; Judith Schmidt;
John D. Medak; Edward T. Medak;
Lee J. Asch; Lee J. Asch, Jr.;
Jack C. Hilbourne; Irene Hilbourne;
Ronald Williamson; Mavis Williamson;
Steven P. Mozinski; Edward Zakocs, Jr.;
Harsch Investment Corp. and its
subsidiaries; P/E Walker Trust;
Sherry Bonney;
Appellants,

MULTNOMAH COUNTY;
the City of Portland;
The Portland Development Commission;
Wasco County; the City of The Dalles;
Columbia Gateway Urban Renewal Agency;
Clackamas County; Washington County;
the City of Tualatin;
Tualatin Development Commission,
Respondents,
and
MARION COUNTY;
the City of Salem;
Salem Urban Development Division;
the City of Oregon City and
Oregon City Urban Renewal Agency,
Respondents (below).

Parent and Non-Wholly Owned Subsidiary Corporations

Rogers Construction, Inc. is the parent corporation of Oregon Asphaltic Paving Co. No other parent or non-wholly owned subsidiary corporate relationships are involved in this case.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS vii

TABLE OF CITED AUTHORITIES viii

CITATIONS OF THE STATE COURT OPINIONS 2

BASIS FOR JURISDICTION 2

1. Date of Judgment sought to be Reviewed 2

2. Statutory Jurisdiction of this Court 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

1. Facts Material to Consideration of the Questions Presented 4

2. Time and Manner of Raising the Federal Question 5

REASONS FOR REVIEW ON CERTIORARI 8

CONCLUSION 11

APPENDIX A.1

TABLE OF CITED AUTHORITIES

CASES — Page

Carpenter v. Shaw, 280 U.S. 363, 369, 50 S. Ct. 121, 123, 74 L. Ed. 478 (1930) 8
City of Portland v. Smith, 314 Or 178, 193, 838 P2d 568, 576 (1992) 4
City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493, 109 S. Ct. 706, 721, 102 L. Ed. 2d 854 (1989) 9
Harper v. Virginia Dept. of Taxation, 509 U.S. ____, 113 S. Ct. 2510, 2519, 125 L. Ed. 2d 74 (1993) 10
Howlett By and Through Howlett v. Rose, 496 U.S. 356, 367, 110 S. Ct 2430, 2438, 110 L.Ed. 2d 332 (1990) 10
McCabe v. Atchison, T. & S.F.R. Co., 235 U.S. 151, 161, 35 S. Ct. 69, 71, 59 L. Ed. 169 (1914) 9
McKesson v. Division of Alcoholic Beverages, 496 U.S. 18, 31, 110B S. Ct. 2238, 2247, 110 L. Ed 2d 17 (1990) 8, 10
Planned Parenthood v. Casey, 947 F2d 682, 691 (3rd Cir. 1991) 10
Regents of University of California v. Bakke, 438 U.S. 265, 289, 98 S. Ct. 2733, 2747–48, 57 L. Ed. 2d 750 (1978) 9
Reich v. Collins, 513 U.S. ____, 115 S. Ct. 547, 550, 130 L. Ed. 2d 454 (1994) 10
Shelley v. Kraemer, 334 U.S. 1, 22, 68 S. Ct. 836, 846, 92 L. Ed. 1161 (1948) 9
Smith v. Multnomah County Board of Commissioners, 318 Or 302, 311, 865 P2d 356, 360 (1994) 4, 6
Spallone v. U.S., 493 U.S. 265, 281, 110 S. Ct. 625, 635, 107 L. Ed. 2d 644 (1990) 11
Tilbury v. Multnomah County, 13 OTR 157 (1994), Aff. 322 Or 112, 902 P2d 577 (1995) 2
Ward v. Board of Comm'rs of Love County, 253 U.S. 17, 24, 40 S. Ct. 419, 422, 64 L. Ed. 751 (1920) 8

Constitutional Authorities

U.S. Const. Art. VI, cl. 2 2
U.S. Const. Amend. XIV § 1 2
Or Const Art XI, § 11b(1) and (3)(a and b) 3, 4

Statutes

ORS 174.040 7
Oregon Laws 1991, Ch 459, § 25 to 28 4
ORS 305.580(1) 2,5
ORS 305.583 ..... 3, 4, 5, 6, 7, 8
42 USC 1257 2

In the

Supreme Court of the United States

October Term, 1995

ROGER TILBURY, et al.,

Petitioners,

v.

MULTNOMAH COUNTY; THE CITY OF PORTLAND; THE PORTLAND DEVELOPMENT COMMISSION; WASCO COUNTY; THE CITY OF THE DALLES; COLUMBIA GATEWAY URBAN RENEWAL AGENCY; CLACKAMAS COUNTY; WASHINGTON COUNTY; THE CITY OF TUALATIN; TUALATIN DEVELOPMENT COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

Roger Tilbury and his co-petitioners respectfully petition the Court for a writ of certiorari to the Oregon Supreme Court.

CITATIONS OF THE STATE COURT OPINIONS

The opinion of the Supreme Court of Oregon is reported at *Tilbury v. Multnomah County*, 322 Or 112, 902 P2d 577 (1995). (A. 2). The opinion of the Oregon Tax Court is reported at *Tilbury v. Multnomah County*, 13 OTR 157 (1994) (A. 11).

BASIS FOR JURISDICTION

1. Date of Judgment Sought to be Reviewed.

The Supreme Court entered its judgment on September 28, 1995. (A. 2).

2. Statutory Jurisdiction of this Court.

Jurisdiction is in this court pursuant to 42 U.S.C. § 1257(a): The validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution because it violates petitioners' rights under the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of Article VI, Clause 2, of the United States Constitution states:

> This Constitution . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. Amend. XIV § 1, states:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law ....

The state statutory provisions involved in this petition are set forth in full in A. 29, *infra*. Of particular interest are two Oregon tax refund statutes.

ORS 305.580 provides in part:

(1) The provisions of ORS 305.583 shall provide the exclusive remedy for determination of questions concerning the effect of the limits of section 11b, Article XI of the Oregon Constitution[1] on taxes, fees, charges and assessments of units of government.

ORS 305.583 provides in part:

(1) Ten or more interested taxpayers may petition the Oregon Tax Court to determine the effect of the limits of section 11b, Article XI of the Oregon Constitution on any tax, fee, charge or assessment imposed by a unit of government. For purposes of this section, 'interested taxpayers' means persons who are subject to the tax, fee, charge or assessment in question.

"* * * * *

(3) In the case of any tax, fee, charge or assessment for any purpose that was imposed under an ordinance or resolution adopted by a local government unit before September 29, 1991, or in the case of any tax levied to pay principal or interest on bonded indebtedness approved by the governing body of a local government unit before September 29, 1991, the petition shall be filed within 60 days after the date the governing body of the local government unit adopts an ordinance or resolution classifying its taxes, fees, charges or assessments as subject to or not subject to the limits of section 11b, Article XI of the Oregon Constitution; or, if the governing body does not adopt a classifying ordinance or resolution, within 60 days after the later of:

(a) The last date, but no later than November 15, that the tax statements were mailed for the tax year in which the tax, fee, charge or assessment was imposed; or

(b) the date of imposition of the tax, fee, charge or assessment on any one of the petitioners that first occurs after September 29, 1991. (emphasis added)

---

[1] Article XI, section 11b(1) of the Oregon Constitution imposes a limitation on property taxes, including those levied for repayment of urban renewal bonds.

STATEMENT OF THE CASE

1. Facts Material to Consideration of the Questions Presented.

In November, 1990, Oregon voters amended their state constitution by initiative measure ("Measure 5") to limit the taxing authority of units of state government. The amendment limits several categories of property taxes, including real property taxes which are levied for urban renewal bonded indebtedness. The amendment states, "The portion of any tax levied in excess of any limitation imposed by this section shall be void." Or Const Art XI, § 11b(1) and (3)(a and b) (A.22).

Despite this limitation, at various times during 1991 respondent governments levied such taxes which exceeded the limits of Measure 5. (A. 6). However, the tax statements mailed to petitioners by respondents affirmatively stated that those taxes were not subject to the limitations of Measure 5 (A. 42). Believing their tax statements to be accurate, the petitioners paid their taxes on or before the due date, November 15, 1991, for the 1991–92 tax year. (A. 39).

Ten months later the Oregon Supreme Court unanimously ruled that respondent City of Portland had violated Measure 5 in this respect. *City of Portland v. Smith*, 314 Or 178, 193, 838 P2d 568, 576 (Sept. 3, 1992).

After the voters had enacted Measure 5 in November, 1990, the Oregon legislature responded in its next session with a tax refund procedure which is the subject of this petition. Or Laws 1991, Ch. 459, §§ 25 to 28. (A. 29). The essence of that procedure, self–described as "the exclusive remedy for taxes collected outside of the new limits," requires ten or more taxpayers to join together in a single refund petition to the Oregon Tax Court within 60 days of the imposition of the contested tax if they wish to challenge any levy of property taxes as being outside the limits imposed by Article XI, §11b. ORS 305.580(1) and ORS 305.583(1) and (3) (A. 29). In *Smith v. Multnomah County Board of Commissioners*, 318 Or 302, 311, 865 P2d 356, 360 (1994), the Oregon Supreme Court held that "the legislature intended ORS 305.583 ... to provide the exclusive means of obtaining such refunds."

The 60–day filing period prescribed by the statute for tax refunds for the 1991–1992 tax year expired no later than January 15, 1992, and in many instances it was even earlier for some of the petitioners. (A. 7)

Soon after the Oregon Supreme Court declared that the collection of these taxes was in violation of Measure 5 these petitioners joined in a petition in the Oregon Tax Court, filed January 5, 1993, seeking a refund of the illegal property taxes which were collected in the 1991–92 tax year for urban renewal bonds. (A. 7, 3, 8).

Both the Oregon Tax Court and the Oregon Supreme Court denied the petitioners' claims for a refund. (A. 10, 20).

2. Time and Manner of Raising the Federal Question.

Petitioners explicitly raised the issue of want of due process in both the lower courts, i.e., a denial of "meaningful backward-looking relief" in requiring the joining of ten or more petitioners into a single refund petition before they may individually seek a post-deprivation remedy. Their petition states:

29.

> The "exclusive remedy" for determinations of the effect of the constitution on local government taxes, declared by ORS 305.580 to lie, in the case of individual petitioners, in ORS 305.583, is thus in violation of due process standards of Ore. Const., Art.I, Sections 18 and 33, and of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs are entitled to refund of the monies unconstitutionally taxed, under common law, federal law, or the general refund statute ORS 311.806, or any other law or principal of equity. (A. 40).

The Oregon Tax Court ruled (13 OTR 157, 164 (1994)):

> ORS 305.583 provides the exclusive remedy for a taxpayer to contest an exaction which is illegal under section 11b of the Oregon Constitution. Because it is the only remedy, due process demands that it be available to an individual.

> Accordingly, the court holds that the "ten" of ORS 305.583(1) is a condition which violates the Due Process Clause of the United States Constitution and must be deemed void. (A. 19).

The Oregon Supreme Court held (322 Or 112, 120, 902 P2d 577, 580 (1995)):

> The Tax Court held that the 10–taxpayer requirement deprived individual taxpayers of their right to challenge a deprivation of property through exaction of a tax. *Tilbury*, 13 OTR at 164. Plaintiffs urge us to affirm that ruling, but we decline to address that question **** (A. 8)

Petitioners also explicitly raised in their petition that it is an inherent violation of due process to provide a 60–day deadline for filing when coupled with the ten–taxpayer requirement. As stated in the petition:

27.

> The filing requirements of ORS 305.583(1) through (8) are the only provisions available to individuals such as petitioners herein who seek to challenge local taxes through the "exclusive remedy" of ORS 305.583. Petitioners could not and cannot make up other filing standards, no matter how sensible or reasonable, that would substitute for "exclusive" procedures enacted by the Legislature. Cf. Smith v. Multnomah County, SC S40152 (January 20, 1994). (A. 40)
>
> "* * * * *
>
> ORS 305.583 does not provide a meaningful opportunity or manner in which an individual may protect his or her property rights under Section 11b. Welch v. Unified Sewerage Agency, 12 OTR 359,364 (1992).
>
> "* * * * *

36.

> The invalidated "ten" requirement of ORS 305.583(1) is incorporated into the filing provisions of ORS 305.583(3)(b)

and thus into ORS 305.583(4) and (6) as well, and is not severable from the exclusive filing provisions of the same statutes. Plaintiffs-petitioners were not at liberty to draft their own idea of what might be an acceptable 305.583(1) petition, or of what might constitute a timely filing.

37.

The statutory provisions of ORS 305.583(3)(4) and (6) for filing of **timely** petitions are thus invalidated by the Tax Court decision in Welch. Since no other statutory time limitations apply to individuals under the "exclusive remedy" of ORS 305.583, petitioners herein cannot be denied their right to refunds, either under the common law, federal law or under ORS 311.806 or any other law, of monies unconstitutionally collected. (A. 42) *Sewerage Agency*, 12 OTR 359, 364 (1992).

The Oregon Supreme Court acknowledged that the petitioners had raised the question: "They [petitioners] contend that: (1) the 60-day rule is not severable from the ten–taxpayer requirement in ORS 305.583(1) and that the latter requirement unconstitutionally denies due process under the Fourteenth Amendment to the Constitution of the United States * * * *" The court held that the 60–day rule could stand alone, independent of the ten-petitioner requirement. The court stated,

> Accordingly, even if the Tax Court's due process ruling is correct, the 60-day filing requirement is severable and, under ORS 174,040 "shall remain in force." (A. 9)

REASONS FOR REVIEW ON CERTIORARI

The Oregon Supreme Court has decided important federal due process questions in relation to state tax refund laws in a way which conflicts with the settled, relevant decisions of this Court.

I

> To say that the county could collect these unlawful taxes by coercive means and not incur any obligations to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the state.

Ward v. Board of Comm'rs of Love County, 253 U.S. 17, 24, 40 S. Ct. 419, 422, 64 L. Ed. 751 (1920) (brackets added).

The foregoing principle applies equally to state courts. "[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Carpenter v. Shaw*, 280 U.S. 363, 369, 50 S. Ct. 121, 123, 74 L. Ed. 478 (1930).

Accordingly, this Court has held, "the Due Process Clause of the Fourteenth Amendment obligates the state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 31, 110B S. Ct. 2238, 2247, 110 L. Ed 2d 17 (1990) (footnotes omitted). Backward–looking relief will satisfy the requirements of the Due Process Clause only when the taxpayer is given "a 'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *McKesson*, 496 U.S. at 39, 110 S. Ct. at 2251 (internal citation and footnote omitted).

In the case at bar, the challenged tax refund statute, ORS 305.583, requires that ten or more taxpayers must band together in a single petition within 60 days before any one of them may seek and obtain a refund of unlawfully collected property taxes. That methodology

abridges the right of each taxpayer to seek a tax refund through the exercise of his own process right to do so.

> The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: 'No state shall...deny to any person within its jurisdiction the equal protection of the laws .' It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.' *Shelley v. Kraemer, supra,* at 22, 68 S. Ct., at 846, Accord, *Missouri ex rel. Gaines v. Canada, supra,* 305 U.S., at 351, 57 S. Ct., at 237; *McCabe v. Atchison, T & S.F.R. Co.*, 235 U.S. 151, 161– 162, 35 S. Ct. 69, 71, 59 L. Ed. 169 (1914). * * * * (underlining supplied)

Regents of University of California v. Bakke, 438 U.S. 265, 289, 98 S. Ct. 2733, 2747–48, 57 L. Ed. 2d 750 (1978).

The personal nature of the right to due process is well–known from the words of its promise in the Fourteenth Amendment and from a number of this Court's decisions. *See e.g., City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493, 109 S. Ct. 706, 721, 102 L. Ed. 2d 854 (1989) (the rights created by the first section of the Fourteenth Amendment are guaranteed to the individual); *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S. Ct. 836, 846, 92 L. Ed. 1161 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights"); *McCabe v. Atchison, T. & S.F.R. Co.*, 235 U.S. 151, 161, 35 S. Ct. 69, 71, 59 L. Ed. 169 (1914) ("[T]he essence of the constitutional right is that it is a personal one.") The forced collectivizing by ORS 305.583 of the petitioners' personal rights to seek their own tax refunds is an obvious and flagrant violation of the Due Process Clause, and the Oregon State Supreme Court should have so held.

II

> To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy.' *O'Connor*, 223 U.S. at 285, 32 S. Ct. 217, for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

McKesson v. Division of Alcoholic Beverages, supra, 496 U.S. at 39, 110B S. Ct. at 2251.

With its methodology of "ten" eviscerated by the Due Process Clause, all that remains of a refund remedy in ORS 305.583 is a 60-day period within which the taxpayers are required to do some unknown something in pursuit of their tax refunds. A hollow 60-day period provides no remedy which is "clear" and "certain." And, like the rule of "ten," it is against the settled law of this Court. *Reich v. Collins*, 513 U.S. ____, 115 S. Ct. 547, 550, 130 L. Ed. 2d 454 (1994), *Harper v. Virginia Dept. of Taxation*, 509 U.S. ____, 113 S. Ct. 2510, 2519, 125 L. Ed. 2d 74 (1993). *See, McKesson Corp. v. Division of Alcoholic Beverages*, supra, 496 U.S. at 31, 110 S. Ct. at 2247: "[T]he Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."

III

> Federal law is enforceable in state courts * * * because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. * * * *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 367, 110 S. Ct 2430, 2438, 110 L.Ed. 2d 332 (1990).

The necessity for a state to exercise its "coordinate responsibility" to enforce federal law is described in *Planned Parenthood v. Casey*, 947 F2d 682, 691 (3rd Cir. 1991):

> Decisions of the Supreme Court regarding federal law and the Constitution are binding on the lower courts. There is no room in our system for departure from this principle, for if it were otherwise, the law of the land would quickly lose its coherence. *See Hutto v. Davis*, 454 U.S. 370, 375, 102 S.Ct. 703, 706, 70 L.Ed 2d 556 (1982). The Supreme Court with its limited docket would become irrelevant in all but a handful of cases that reached it.

This Court has settled the due process issue in this case in the recent tax refund cases of *Reich, Harper,* and *McKesson*. The opinion of the Oregon Supreme Court—"we decline to address that question"—is an insouciant disregard of that court's "coordinate responsibility" to enforce the decisions of this Court as the law of the land. And as such, the opinion below borders upon an "open and sustained official defiance of established constitutional values and valid judicial orders," *Spallone v. U.S.*, 493 U.S. 265, 281, 110 S. Ct. 625, 635, 107 L. Ed. 2d 644 (1990) (Brennan, J., dissenting), which, in turn, implicates the Supremacy Clause, U.S. Const. Art. VI, cl. 2.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Roger Tilbury
Attorney at Law
1123 SW Yamhill Street
Portland, OR 97205
Telephone: (503) 224-8503
December 26, 1995